

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF SECRETARY

Implementation of Section 402(b)(1)(A)
 of the Telecommunications Act of 1996

CC Docket No. 96-187

PETITION FOR RECONSIDERATION
 OF SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company (SWBT), pursuant to Section 1.429 of the rules¹ of the Federal Communications Commission (Commission), respectfully requests that the Commission reconsider and revise its R&O² as set forth below.

I. THE R&O UNREASONABLY RESTRICTS THE MEANING OF "DEEMED LAWFUL"

The R&O concludes that, because Section 204(a)(3) uses the phrase "deemed lawful," it must be read to mean that a streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect. According to the R&O, however, Section 204(a)(3) does not mean that the Commission is precluded from finding, under Section 208, that a rate will be unlawful if a carrier continues to charge it during a future period or from prescribing a reasonable rate as to the future under Section 205.

SWBT respectfully requests that the Commission reconsider its interpretation of the applicability of Section 208 to "deemed lawful" tariffs. The Commission should not generally allow Section 208 complaints to be filed against streamlined tariffs.

¹ 47 C.F.R. Section 1.429.

² Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, Report and Order (FCC 97-23) (released January 31, 1997) (R&O).

From the words used by the R&Q, streamlined tariffs that take effect are “conclusively presumed to be reasonable.” If a tariff is conclusively presumed to be reasonable, a complainant cannot ever meet its burden of proof³ to show that the tariff rate is “in contravention to the provisions [of the Communications Act.]”⁴ Thus, Section 208 complaints should be prohibited in such cases.

Any other result makes the finding of lawfulness accorded by the statute a virtual nullity. A conclusive presumption should give the carrier greater rights against those that wish to claim that a rate is unlawful. Without an absolute bar to such complaints (or some other limitation which would require the complainant to show that the Commission has somehow removed the “conclusive presumption”) the filing carrier only obtains protection from retroactive damages under the Commission’s interpretation. The Commission’s view is apparently that a rate can be “deemed lawful” only until a complaint is filed, at which time the rate may lose that status pending the completion of the complaint proceeding.

SWBT’s view does not preclude the Commission from acting under Section 205 to effectively change the law that applies to a particular tariff rate.⁵ Nor does it preclude complainants from filing Section 208 complaints against a carrier for acts that allegedly violate the Communications Act other than those where a carrier is merely applying a tariffed rate or practice. The statute does, however,

³ “In a complaint proceeding, the burden or [sic] proving unreasonableness, as well as damages, is borne by the complainant”. *The Christie Bros. Fur Corp. v. New York Telephone Company*, File No. E-84-29, Memorandum Opinion and Order, 1985 FCC LEXIS 3496, Released April 17, 1985, at para. 4. See also, e.g., *Thornell Barnes Co., et al. v. Illinois Bell Telephone Co.*, 1 FCC 2d 1247, 1264-67 (1965); *Hughes Sports Network, Inc. v. AT&T*, 25 FCC 2d 550, 553 (1970); *Mocatta Metals Corp. v. ITT World Communications, Inc.*, 54 FCC 2d 104, 115 (1975).

⁴ 47 U.S.C. § 208(a).

⁵ See SWBT Comments, p. 4.

provide carriers with streamlined tariffs a “safe harbor” in which they can operate without fear of post-effective attack upon their rates or tariffs.

II. THE R&O PROCEDURES FOR THE PROTECTION OF CONFIDENTIAL DATA DO NOT PROPERLY ADDRESS LEC CONCERNS.

A. The Standard Protective Order is Deficient.

The R&O finds that use of standard protective orders for purposes of streamlined LEC tariff review will properly serve the dual purpose of permitting limited access to important information by interested persons while protecting proprietary information from public disclosure. The R&O thus issues a standard protective order for use in streamlined local exchange carrier (LEC) tariff filings.

The standard protective order, however, is deficient. It does not address all the concerns raised by SWBT in Comments. It does not forbid the making of copies, or the possession of those copies at the offices of the commenting party, even for information warranting the highest degree of confidentiality. Also, it does not address the situation faced by SWBT in the past, and noted in Comments, where SWBT’s vendors assert confidentiality rights over information required by the Commission. Any standard protective order must address the need to protect the confidential information of third party vendors.

As described below, the imposition of a deficient protective order unjustifiably limits the use of the streamlined tariff procedures. If a protective order is to be imposed, it must allow for cases where the disclosures granted by the R&O’s protective order are further limited.

B. The R&O Unjustifiedly Restricts SWBT’s Rights to Protect Confidential Information.

Increasingly, the competitive marketplace dictates that cost information remain confidential. Competitive pressures aside, as indicated above, SWBT does not necessarily have the ability to

“agree” to any disclosure of certain materials since the agreements between SWBT and its vendors may not, for example, permit disclosure of pricing information even under protective order.

Under the R&O, however, SWBT would effectively be precluded from the use of streamlined procedures in any cases where SWBT cannot disclose the required confidential information. The R&O thwarts the intent of both the Telecommunications Act of 1996 and the FOIA by apparently requiring a waiver of some confidentiality rights in exchange for streamlined filing. Sufficient protection of confidential information and streamlined tariff filings should not be made mutually exclusive. Obviously, where competitive concerns are paramount, Congress could not have intended to prevent a carrier from using the streamlined procedures. The Commission should make protective orders unnecessary for the reasons described in SWBT’s Comments by eliminating cost support requirements.⁶ At a minimum, the Commission must adopt procedures that allow LECs to file streamlined tariff changes without requiring them to compromise complete confidentiality of their sensitive information.

III. THE R&O UNREASONABLY LIMITS HOW THE STATUTE APPLIES TO ANNUAL FILINGS.

The R&O continues to require price cap LECs to file the tariff review plan (TRP) for their annual access filing, 90 days prior to July 1 of each year.⁷ SWBT respectfully requests that the Commission reconsider its interpretation of the statute to annual filings.

⁶ See also SBC’s Comments in GC Docket No. 96-55.

⁷ R&O, para. 102.

The R&O attempts to justify its conclusion by stating that rate information need not be included in the TRP. The R&O also states that: “any notice period less than 90 days would be inadequate to allow interested parties to review these filings carefully.”⁸

The deletion of “rate information” and the alleged need for “interested parties to review these filings” does not justify modifying the intent of the statute. In fact, deletion of the rate information obviates the Commission’s stated purpose for the TRP: “LECs are required to file summary material, known as tariff review plans (TRPs), to support the revisions to rates in the annual access tariffs.”⁹ and; “the chief purposes of TRPs are to: . . . (iii) verify that the proposed rates are within the established price caps.”¹⁰

Early filing of TRPs, even absent rate information, will result in early notification of the rate reductions that will subsequently be required when the proposed price cap indices are less than the current actual price indices. The Commission should reconsider this decision as this “early notification” unlawfully dilutes the intent of the statute.¹¹

The Conference Report plainly states that subsection (b) “addresses regulatory relief that streamlines the procedures for revision . . . of charges, classifications and practices” This intent is not fulfilled if the same amount of TRP information is required to be filed in total, and if most of that information is still required to be filed on the same notice as before the change in the statute.

⁸ R&O, para. 102.

⁹ R&O, para. 96.

¹⁰ R&O, para. 101.

¹¹ In comparison, non-price cap LECs’ TRPs generally require much greater analysis since they include detailed cost and demand projections. The R&O, however, allowed these TRPs to be filed concurrent with the annual filings of these companies.

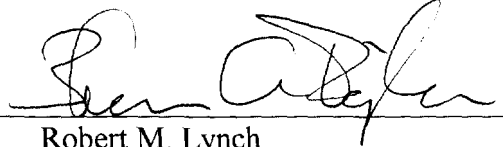
Instead, less information should be required, and none of it should be submitted until the rest of the filing is made.

IV. CONCLUSION

For the foregoing reasons, SWBT respectfully requests that the Commission reconsider and revise its R&O as described above.

Respectfully submitted,

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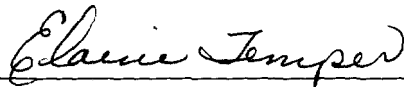
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March 10, 1997

Certificate of Service

I, Elaine Temper, hereby certify that Southwestern Bell Telephone Company's PFR of the Report and Order on Streamlining Tariff Filings on Docket No. 96-187 has been served this 10th day of March, 1997 to the Parties of Record.

A handwritten signature in cursive script, reading "Elaine Temper", is written over a horizontal line.

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